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# Open Housing

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problem created on our highways by the drinking driver. With stiffer laws and enforcement procedures such as these, drivers should be deterred from drinking excessively while driving. The effectiveness of the new law should be shown in the near future by fewer accidents, especially fatal ones.

*William Douglass Goodwin*

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### Open Housing

On February 7, 1968, an open housing law was passed to amend article four, chapter eight of the Code of West Virginia. As amended a new section thirty was added. It provides:

The council or similar governing body of any municipality (however created, whether operating under a legislative charter, home rule charter or general law only, and notwithstanding any statutory or municipal charter provisions to the contrary) shall have the power and authority, by ordinance, to prohibit discrimination on the basis of race, creed, color or national origin in the sale, purchase, lease or rental of housing accommodations within the corporate limits of such municipality, and to impose fines for the violation of the provisions of any such ordinance.<sup>1</sup>

As the focus in civil rights moves from the streets to the compromise table, many states have taken the initiative to enact fair housing legislation.<sup>2</sup> The primary purpose of this legislation is to prevent discrimination by vendors and lessors against prospective buyers or tenants because of race, color, or creed. The underlying legal authority of all legislation of this type has been the liberal construction by the United States Supreme Court of the commerce clause, the Bill of Rights and the thirteenth, fourteenth, and fifteenth amendments. The civil rights movement in the United States was unquestionably initiated when the Supreme Court in 1954 handed down the landmark decision of *Brown v. Board of Education*.<sup>3</sup>

The anti-discrimination act as passed by the West Virginia Legislature is in the form of an enabling act. The act enables municipalities

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<sup>1</sup> Ch. 37, Acts of the West Virginia Legislature, Reg. Sess. 1968.

<sup>2</sup> Note, *Open Housing Meets My Old Kentucky Home*, 56 Ky. L.J. 140, 187 (1967): "As of June 1967, some nineteen states and twenty-eight cities had adopted anti-discrimination laws affecting some part of the private housing market."

<sup>3</sup> 347 U.S. 483 (1954).

to pass open housing ordinances with state sanction as long as the ordinances comply with the statute. Before this enactment the West Virginia Legislature had not given any authority in this field to municipalities. Therefore, since West Virginia follows the Dillon Rule<sup>4</sup> as to the powers of a municipal corporation, any previous open housing ordinance passed by a municipal government would not have been within the powers delegated to the municipal corporation.

Other states have upheld municipal open housing ordinances on the basis of municipal police power.<sup>5</sup> However, the West Virginia Supreme Court of Appeals in *Alderson v. City of Huntington*<sup>6</sup> held that a municipal corporation possesses no inherent police power and has only such regulatory power as has been expressly or impliedly conferred by the constitution or delegated to it by the legislature. The holding in the *Alderson* case and the Dillon Rule would thus make it impossible for a valid municipal open housing ordinance to have existed either under inherent powers or police powers of a municipal corporation in West Virginia prior to this statute.

In any discussion of open housing legislation, one must consider the conflicting interests of the buyers who favor such laws and the property owners who oppose them. Proponents of open housing rely strongly on the arguments of due process<sup>7</sup> and equal protection.<sup>8</sup> While on the other hand, those in opposition to open housing allege that they should be able to sell or rent to whomever they please

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<sup>4</sup> *Law v. Phillips*, 136 W. Va. 761, 68 S.E.2d 452 (1952); *Hyre v. Brown*, 107 W. Va. 505, 135 S.E. 656 (1926). The Dillon Rule as commonly stated and followed in West Virginia is as follows: "A municipal corporation possesses and can exercise only the following powers: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient—but indispensable." 1 DILLON ON MUN. CORP. (5th ed.) § 237 (1911).

<sup>5</sup> For a survey of the cases in this area see *Power of Municipal Corporation to Enact a Civil Rights Ordinance*, 4 WASHBURN L.J. 128 (1964).

<sup>6</sup> 132 W. Va. 421, 426, 52 S.E.2d 243, 245 (1949); *Law v. Phillips*, 136 W. Va. 761, 68 S.E.2d 452 (1952); *Anderson Newcomb Co. v. City of Huntington*, 117 W. Va. 716, 188 S.E. 118 (1936).

<sup>7</sup> Those relying on due process cite the case of *Palko v. Conn.*, 302 U.S. 319 (1937), wherein Justice Cardozo asserted that due process is composed of those things which are "of the very essence of a scheme of ordered liberty. It involves principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 325.

<sup>8</sup> *Reitman v. Mulkey*, 387 U.S. 369 (1966), which held that a California code provision which said no state or political subdivision shall deny or abridge a person's right to sell as he chooses was invalid under the fourteenth amendment equal protection clause.

based solely on their own individual selection,<sup>9</sup> and that they have a property right that should not be deprived them without due process of law.<sup>10</sup>

In considering the constitutional arguments against open housing, the one that seems the most fallible, and the one most often advanced, is the *property rights* argument. The basic weakness in this argument is that open housing does not amount to a taking, but rather is only a regulation on the use of the property. Open housing laws only prohibit the refusal to sell or lease when this refusal is based on certain grounds such as race, creed, or color.

Since Congress has only recently passed a national open housing law, it is necessary for comparison to consider what other states and local governments have done in this area.

New York City was the first governmental entity to enact a general fair housing law.<sup>11</sup> When New York City adopted their open housing legislation, they set up a commission to enforce it. This followed a practice used by the federal government and New York State to police discrimination in employment. Most other governing entities who have adopted open housing laws have used this commission approach. Under this system there are basically four procedural stages for handling a complaint:

- 1) an investigation to determine the facts;
- 2) an attempt to eliminate the discrimination by conference, conciliation, and persuasion;
- 3) if step (2) fails, formal procedures begin usually in the form of a public hearing, ultimately culminating in the issuance of an order to cease the discriminatory practice;
- 4) if the order is not obeyed, enforcement is sought through the courts.<sup>12</sup>

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<sup>9</sup> The freedom of individual selection is based much on the freedoms of the first amendment to the constitution. These freedoms are discussed in Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963).

<sup>10</sup> The Supreme Court in *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) said that: "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it." The proponents of the "property rights" argument rely on *Buchanan and Great Atlantic & Pacific Tea Co. v. Cream of Wheat*, 227 F. 46 (2d Cir. 1915) which held that a trader could buy from whom he pleased and sell to whom he pleased.

<sup>11</sup> NEW YORK CITY FAIR HOUSING PRACTICES LAW (N. Y. City, Local Law No. 80, Dec. 30, 1957).

<sup>12</sup> Note, *Open Housing Meets My Old Kentucky Home*, 56 KY. L.J. 140, 189 (1967).

This commission approach to enforcement of an open housing law really amounts to enforcement by persuasion. The West Virginia law provides for no such commission or other intermediary to aid in the enforcement of the law.<sup>13</sup> Therefore, it would appear that many practical problems may arise in the enforcement by a municipality of a fair housing law set up under our West Virginia statute.

Even though the West Virginia statute does not provide for a commission, a municipality in actual practice could use some type of persuasion before resorting to fines for violation of the statute. Therefore, it might be suggested that a municipality in adopting open housing under our statute could at the same time set up a commission to help in the administration of the law. However, such a commission would have to be limited merely as a fact finding committee which would receive no compensation from the government.

Kentucky is another state that has open housing only on the municipal basis. This practice is followed in Kentucky because the constitution<sup>14</sup> of the state of Kentucky places its cities in various classes and gives different powers to each class of cities. The Kentucky system is different from our statute in that all municipalities in the state do not have the power to adopt fair housing ordinances. However, the experience in Kentucky with municipally initiated open housing has been that laws were not adopted in the large urban areas where they are needed the most.<sup>15</sup>

Another attendant problem underlying the municipally oriented law is that many areas of the state are not encompassed within any municipality. Therefore, these areas, which are many times prosperous subdivisions, would escape fair housing laws altogether.

It is admittedly difficult to surmise what effect, if any, this legislation will have on renting and selling in West Virginia. However, in any consideration of this statute one must realize that the legislation is an attempt to cope with a very imminent social problem. To some the provisions of this bill may seem very weak and only a

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<sup>13</sup> See *Id.* at 189-94, for a discussion of how the commission approach has worked in many of the major United States cities.

<sup>14</sup> KY. CONST. § 156; KRS § 83.011 (1954); KRS § 83.010 (1942).

<sup>15</sup> Note, *Open Housing Meets My Old Kentucky Home*, 56 KY. L.J. 140, 224-28 (1967).

recognition of the problem. But, on the other hand the bill does provide some impetus to those who would not act until some legislation was passed.

Only time will give us an answer as to how many municipalities will pass open housing ordinances under this statute. Therefore, we must wait before it will be apparent what this bill has accomplished.

*Patrick David Deem*